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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 363

DOVIE RAY BAKER *et al.*, *Petitioners*,

v.

TEXAS AND PACIFIC RAILWAY CO., *Respondent.*

On Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

I. Citation to Opinion Below

The opinion of the Court of Civil Appeals (R. 204-220), is not officially reported but is printed in 309 S. W. 2d 92. The Supreme Court of Texas wrote no opinion in refusing Petitioners' application for a writ of error.

II. Jurisdiction

The judgment of the Court of Civil Appeals was entered on December 6, 1957. (R. 221.) The order denying Peti-

tioner's motion for rehearing by said Court of Civil Appeals was rendered and entered on January 17, 1958 (R. 234). Petitioners' application for writ of error to the Supreme Court of Texas, timely filed, was refused, no reversible error on April 30, 1958 (R. 235). The order denying Petitioners' motion for a rehearing of their application for writ of error by the Texas Supreme Court was rendered and entered on June 18, 1958 (R. 247). The Court of Civil Appeals thus became in this case the highest court of the state in which a decision could be had. *Panhandle Eastern Pipe Line Company v. Calvert*, 347 U. S. 157 (1954). Petition for writ of certiorari was filed on September 14, 1957, within ninety days after entry of judgment.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3) because Petitioners' cause of action is under the Federal Employers Liability Act, 35 Stat. 65, 45 U. S. C., Sections 51 et seq., and because a right and privilege is specially set up and claimed under said Act and under the Constitution of the United States and because the Court of Civil Appeals has decided questions of substance under that Act not heretofore determined by this Court and decided in a way probably not in accord with the applicable decisions of this Court.

III. Questions Presented

Petitioners are the widow and minor children of Claude Baker, who was killed when struck by Respondent's train on the 20th day of August, 1952, while in the regular course of his employment with W. H. Nichols & Co. as a

member of a crew doing a type of maintenance work for Respondent called "grouting" along the Respondent's main line double tracks. It is stipulated that the main line double tracks are used in the movement of freight and passenger trains in interstate commerce. (R 162.) Respondent's east and west-bound trains were passing each other at the time Baker was struck and the jury found that the negligence of Respondent's enginemen on the east-bound train which struck Baker was a proximate cause of Baker's death; that Baker's own negligence was a proximate cause of his death; and that Petitioners' damages totaled $28,045.00. (R. 26-38.) None of these findings have been questioned on appeal.

Substantial evidence was introduced that W. H. Nichols & Co. was not an independent contractor. (R. 75-131.) The trial court, refusing to permit Petitioners to present their case to the jury under the Federal Employers Liability Act (hereinafter called FELA), but applying state law, entered judgment for Respondent that Petitioners take nothing by their suit (R. 38-42), which judgment was affirmed by the Texas appellate courts. The questions presented are:

1. Whether the Texas courts have the power to deny Petitioners a jury trial to determine their federal rights under FELA when substantial evidence was introduced that the employer of the deceased, Claude Baker, doing maintenance work on Respondent's main line railroad bed, was not an independent contractor but a mere agent or employee of Respondent.

2. Whether Respondent had the power to exempt itself from liability to Petitioners under FELA by attempting to delegate to the employer of Claude Baker some of its duties imposed by law to maintain its main line roadbed carrying interstate commerce.

3. Whether Claude Baker was an employee of Respondent within the meaning of FELA because he was doing the work of Respondent closely and substantially affecting, and in the furtherance of, interstate commerce.

IV. Constitutional Provision and Statutes Involved

1. The constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States. Appendix "A" *Infra*, p. 45.)

2. The statutory provisions involved are Sections 1, 3, and 5 of the Federal Employers Liability Act, 35 Stat. 65, 66, 53 Stat. 1404, 45 U. S. C., Sections 51, 53 and 55; paragraphs (3), (4) and (21) of Section 1 of the Interstate Commerce Act, 41 Stat. 474, 49 U. S. C., Sections 1 (3), (4) and (21), and Articles 6506 and 6507, Vernon's Texas Statutes (1948). (Appendix "A" *Infra*, pp. 45-52.)

V. Statement

1. Material Facts

Claude Baker, previously a tenant farmer (R. 144-148), had been hired by W. H. Nichols & Co. (hereinafter called Nichols) and received his wage payments from Nichols. Four days after Baker was killed by Respondents' train

Petitioners filed a claim for workmen's compensation benefits and received a lump sum settlement of $7,919.94 from the compensation carrier for Nichols (R. 152, 153, 200-203). However, when Petitioners' counsel became aware of the nature of Baker's duties and of the contract between Nichols and Respondent, Petitioners' complaint and petition against Respondent originally based on a common law action for negligence was amended to set forth a claim based on FELA (R. 157, 158, 163, 164).

The basis of Petitioners' claim under FELA is that the contract between Respondent and Nichols provided that Nichols was to do certain maintenance and repair work on Respondent's railway tracks used in interstate commerce; that although the contract specified that Nichols was an independent contractor, the arrangement was in truth and in fact made to evade the provisions of FELA since Respondent controlled and had the right to control the details and the manner in which Nichols performed such maintenance work; that at the time Baker was killed he was performing work for Respondent in the furtherance of interstate commerce and was performing work so closely and substantially affecting interstate commerce as to entitle Petitioners to the benefit of the Federal Employers Liability Act and bring Baker within its terms and provisions. (R. 3-5.)

Evidence introduced to support Petitioners' claim under FELA include the contract and the extension of the contract between Respondent and Nichols. (Printed in the opinion of the Court of Civil Appeals.) (R. 204-207.) It pro-

vided for Nichols to furnish labor, equipment and water for grouting the roadbed of Respondent's double track main line at certain locations as specified by and to the satisfaction of Respondent's chief engineer or his duly authorized representative. Section 2 of the contract provided that Respondent pay Nichols on a per unit basis and transport free to and from the work site, the workers and equipment, but at Nichols' risk (R. 205, 6). Respondent furnished the sand and cement used in the grouting mixture. (R. 137, 138, 139.) Section 4 of the contract provided that Nichols indemnity Respondent for any and all liability arising from the contract or work performed under it. (R. 206.) Section 5 imposed upon Nichols all liability and indemnity to Respondent for taxes, contributions and comparable payments imposed by any government agency incident to payment by Nichols of any compensation to its employees (R. 206).

Evidence was introduced that W. J. Savages' (Respondent's assistant chief engineer) principal duties were to supervise the railroad division employees working on the maintenance of the roadbed and tracks and to make appropriations to the various divisions of the railroad for the upkeep of the tracks and structures (R. 132); that grouting work was for the purpose of sustaining, stabilizing, straightening and strengthening the roadbed by filling cracks and crevices with a cement mix (R. 64, 136) and is a method of putting the mix into the embankment to fill the voids and force out the water from water pockets that form in the roadbed embankment (R. 136), the locations

of which were laid out in the engineering department of Respondent (R. 180), based on the unstable positions of the tracks (R. 195), which Respondents specified within particular limits (R. 196); that maintenance of the roadbed and tracks is principally a matter of keeping the tracks in a safe and good riding condition; that low spots make the roadbed unsafe and interfere with the operation of high-speed trains and their elimination is a necessary part of the maintenance of the roadbed (R. 133); that grouting is one type of maintenance work done to preserve the roadbed in good condition. Savage first agreed that grouting work is simply part of the regular maintenance of the track; later he called it a special type of maintenance (R. 139) and still later under direct examination of Respondent's counsel he said he "would consider it rather extraordinary maintenance." (R. 192.)

Although Section 3 of the contract between Respondent and Nichols declared that Nichols "shall occupy the status of an independent contractor and shall not be subject to the detailed supervision and direction of the carrier [Respondent] but responsible to carrier only for the final results in the accomplishment of such work or services," Section 1 directed that Nichols was to grout roadbed at locations only as specified by and to the satisfaction of Respondent's chief engineer.

Contrary to the declarations in Section 3 of said contract, voluminous testimony by numerous members of the grouting crew may be summarized to show that in actuality they had been told by Nichols' foreman to obey the order of Re-

spondent's inspector, Slaton, who was on the job almost all the time while the crew was working. (R. 77, 101-103, 109, 114, 119, 123); that all the men obeyed Slaton (R. 77, 109); that Respondent's inspector Slaton would direct the crew members to thicken or thin the grout being used by adding more sand, cement or water (R. 76, 101, 108, 109, 114, 119, 130, 131).

Claude Baker's job was handling cement (R. 63). His duties were to open sacks of cement and pour cement in a hopper on the grouting machine while other crew members poured sand in the hopper (R. 73). The grouting machine was located 6 feet from the railroad tracks (R. 74). After Baker emptied the sacks of cement he would throw them in a pile at his feet and then take the pile across both mainline tracks and pile them up to be burned. Sometimes he would take the sacks across the tracks one at a time. (R. 75.)

No one but Slaton marked off the places in the roadbed where the points were to be driven into the ground so that the grout mixture could be pumped therein. The selection of such places was left solely up to Slaton (R. 76, 77, 108, 109, 114, 119, 120); and neither the pointman of the crew nor anyone else except Slaton had anything to do with the selection of the places where the points would be driven in the ground (R. 83, 84, 108, 109, 119, 120). Slaton would tell the men when and where to move to a new location after the grouting was finished at an old location (R. 76, 108). A primary duty of Slaton was to prevent the grouting under pressure from humping or throwing the tracks

out of cross level by seeing that the grouting men did not pump too much mixture in the embankment (R. 109, 195). But Slaton was very reluctant to admit even this degree of control on cross examination (R. 183-185). He did admit he saw to it that the grout mixture was correct (R. 186). Also to put out slow flags to let Respondent's trainmen know the grouting crew was at work and to control the grouting work so that it did not interfere with the operation of the trains (R. 83, 84). As admitted by Respondent's own witnesses (R. 140, 143), Respondent even prescribed the minimum distance from the tracks where the grouting machine was placed (R. 143).

Even cross-examination by Respondent's own counsel brought out certain facts raising a serious question about Nichols' status as an independent contractor (R. 83-85). It was thus revealed that Slaton would order a crew member to move a grouting point from the ground when the mixture bubbled out due to the inattentiveness of a crew member (R. 111). And one crew member when asked whether he worked for the T & P Railroad answered: "I don't know whether I was or not. I might—I might have been working for both. It was all I knew. I just—I was on the T & P railroad work." (R. 129.)

Respondent's assistant chief engineer admitted that if Respondent's roadmaster had decided after a period of time that all the grouting work needed had been done he had the right under the contract to terminate the work and that the area to be grouted was up to the railroad, as well as the number of feet to be worked (R. 142, 372);

that the contract did not cover any specific amount of money but that was left open to be determined from time to time (R. 193) and that the contract could be canceled by Respondent at any time (R. 194).

Evidence was also furnished by Respondent's assistant chief engineer and by Slaton that Respondent furnished the sand and cement used in the grouting mixture (R. 137) and that the contract provided that Respondent was to transport Nichols' men and equipment by railroad to and from the site of the work without charge; that Respondent could do the grouting work itself if it had the equipment; that the equipment used was a hydraulic pump called a "mud jack" that forced the grouting material into the railroad embankment under pressure; that such pumps are in common use in highway and construction work and are available for purchase by Respondent (R. 136, 137); that there was no skill required of grouting crew members in mixing the sand and cement and putting the points in the ground (R. 186, 197, 198); that the crew members were laboring men and rather uneducated (R. 186, 198); that it was debatable whether grouting required any particular skill and from an engineer's standpoint it should be done according to a pattern and there is some skill required to arrive at the best pattern (R. 136); that Respondent's Inspector Station had the right to require Nichols to make more perforations if Slaton thought they were not making enough and Slaton likewise had the right to require Nichols to put more sand in the holes or perforations (R. 141).

2. How Federal Questions Were Presented in the State Courts

Before the case was submitted to the jury, Petitioners asked the trial court to submit their specially requested issue No. 1 and later their specially requested issue No. 13. These specially requested issues were substantially identical and No. 13 reads as follows:

> "Do you find from a preponderance of the evidence that at the time Claude Baker, deceased, sustained his fatal injuries, W. H. Nichols & Company, Inc., did not bear the relationship to Texas & Pacific Railway Company of an independent contractor, as that term has been defined herein for you.
>
> "Answer 'It was not an independent contractor, or 'it was an independent contractor'.
>
> "Answer .....
>
> " 'An independent contractor' as used in the above Special Issue, is meant any person, who, in the pursuit of a business or occasion undertakes to do a particular work for other persons, and who has control of such work in respect to the details of the work to be performed, and over whom the person for whom the work is being done, has no right or control as to such details, and who represents the will of the person for whom the work is done, only as to the result of this work, and not as to the means or method by which it is accomplished."

The Petitioners also requested the court to submit to the jury their specially requested issue No. 12 reading as follows:

> "What do you find in terms of percentage to be the entire causal negligence, if any, attributable to Claude

Baker, deceased, and what attributable to Defendant, Texas & Pacific Railway Company?

"Answer: Attributable to Claude Baker, deceased ..... per cent.

"Answer: Attributable to the Texas & Pacific Railway Company ..... per cent."

But the court refused to submit to the jury any of the said specially requested issues. (R. 56, 57.)

On appeal to the Texas Court of Civil Appeals the following points were preserved and argued to the said court:

> **"First Point**—The Court erred in failing to submit Plaintiff's Specially Requested Issue No. 12, inquiring as to the percentage of negligence attributable to Defendant and that attributable to Claude Baker, deceased, because the evidence established as a matter of law that Claude Baker was covered by the provisions of the Federal Employers Liability Act and therefore his contributory negligence was not a complete defense to Plaintiffs' suit but would only diminish their recovery and Plaintiffs were entitled to have their theory of the case submitted in such issue. (R. 48.)
>
> **"Second Point**—The evidence was sufficient to raise the question of whether or not W. H. Nichols & Company, Inc. was an independent contractor, and therefore, the Court erred in failing to submit either Plaintiffs' Specially Requested Issue No. 1 or No. 13, inquiring as to such fact, which issue was raised by Plaintiffs' pleadings. (R. 47, 49.)

After the trial court's judgment was affirmed by the Court of Civil Appeals and Plaintiffs' motion for rehearing was overruled by the said court, Plaintiffs then applied

for a writ of error to the Supreme Court of Texas, urging the following points:

"**Point of Error Number One.** The Court of Civil Appeals erred in holding that Petitioners were not entitled to submission of their Requested Issue No. 12 under the Federal Employers Liability Act (45 U.S.C., Sect. 51) because the Deceased, Claude Baker, was within the scope and coverage of that Act, and therefore Petitioners were deprived of their affirmative theory of the case. (Germane to Assignment of Error No. 15, and Points of Error Nos. 1 and 2 in Petitioners' Motion for Rehearing.)

"**Point of Error Number Two.** The Court of Civil Appeals erred in holding that Petitioners were not entitled to affirmative submission of their case under the Federal Employers Liability Act (45 U.S.C., Section 51) because they failed to request an issue inquiring into the intent and purpose of the contract between Deceased's employer and the Texas & Pacific Railway Company. (Germane to Point of Error No. 1, in Petitioners' motion for Rehearing.)

"**Point of Error Number Three.** The Court of Civil Appeals erred in holding that Petitioners were not entitled to submission of their affirmative theory of the case under the Federal Employers Liability Act (U.S.C., Sect. 51) because of their failure to request an issue inquiring whether the maintenance work that Deceased was performing at the time of his death was ordinary or extraordinary maintenance. (Germane to Point of Error No. 2 in Petitioners' Motion for Rehearing.)

"**Point of Error Number Four.** The Court of Civil Appeals erred in holding that there was no evidence that W. H. Nichols & Company, the Deceased's employer, was not acting as an independent contractor

> at the time Deceased met his death. (Germane to Point of Error No. 3 in Petitioner's Motion for Rehearing.)" (R. 222.)

The Supreme Court refused Petitioners' application for writ of error and Petitioners filed a motion for rehearing which again brought to the attention of the Supreme Court of Texas the points brought forth in Petitioners' application for writ of error. (R. 236, 237.) The Supreme Court of Texas subsequently overruled Petitioners' motion for rehearing on their application for writ if error. (R. 247.)

VI. Summary of Argument

Petitioners seek to have their rights under FELA determined on the theory that Claude Baker was an employee of Respondent at the time he was negligently killed by Respondent's train, because Nichols, who employed and paid Baker, was not really an independent contractor but was an agent or employee of Respondent.

Petitioners' first argument is that they were deprived of their constitutional right to a trial by jury on the FELA issues. Although such issues were raised by an abundance of substantial evidence, the trial court refused to submit them to the jury and this refusal has been upheld by the Texas appellate courts. Was Nichols an independent contractor or an employee of Respondent? Tests approved by this Honorable Court to determine this issue are whether Respondent had "control" or "right of control" over the details of the work being performed. Many witnesses, including some of Respondent's, testified in detail that Re-

spondent, through its inspector Slaton, had "control" and "right of control" and actually exercised control over almost all the details of the work of Nichols' employees, including Baker.

Also under the approved tests of "whose is the work being performed" and whose is the "power to control" there was evidence that the work being done was a type of maintenance work on Respondent's mainline roadbed. It was a part of Respondent's regular business performed by common laborers using ordinary and available tools under a contract terminable at the will of Respondent on a per unit or piecework basis rather than a lump-sum contract.

The Texas Court of Civil Appeals admitted Respondent exercised actual control of the details of the work but, misstating the law, held that such exercise of actual control was "not material." Then, ignoring all the evidence to the contrary it held as a matter of law that Respondent had no "right of control" of the details of the work. In so doing it violated the established federal rule that in passing on whether there is sufficient evidence to submit the issue to the jury it should look only to evidence and reasonable inferences which support Petitioners' case. *Wilkerson v. McCarthy*, 336 U. S. 53, 57 (1949). And it denied Petitioners their right to a trial by jury. *Schulz v. Penna. R. Co.*, 350 U. S. 523 (1956).

Petitioners' second argument is that Federal and Texas Statutes impose upon Respondent the obligation and nondelegable duty to maintain its tracks and roadbed. A type

of Respondent's non-delegable maintenance work was being done by Nichols' employees under a contract providing that Nichols fully indemnify Respondent for any liability arising from the performance of the work. Consequently Nichols carried Texas Wokmen's Compensation insurance on Baker and the other workers. The practical effect of the contract was to exempt Respondent from its liability to Baker under FELA in having this non-delegable maintenance work performed by Nichols. Therefore that contract is in violation of Sec. 55 of FELA. *Philadelphia, Baltimore & Washington R. R. Co. v. Schubert*, 224 U. S. 603, 613. *Erie R. Co. v. Marque*, 23 F. 2d 664 (C. A. 6, 1928).

Petitioners' third argument is that Claude Baker was doing the railroad's work. He, along with the rest of Nichols' employees and Respondent's regular maintenance crew, were engaged in a common endeavor as part of and in furtherance of Respondent's unitary enterprise. He was daily exposed to the risks inherent in railroad work just as regular maintenance employees. Therefore Baker should be classified as an employee of Respondent within the meaning of FELA. Cf. *Sinkler v. Missouri P. R. Co.*, 356 U. S. 326 (1958).

VII. ARGUMENT

POINT ONE: Petitioners were deprived of their constitutional right to a trial by jury to determine their rights under FELA because there was substantial evidence that Nichols, the employer of Claude Baker, doing

maintenance work on Respondent's main line railroad bed was not an independent contractor but was a mere agent or employee of Respondent.

1. *PETITIONERS WERE ENTITLED TO A JURY TRIAL ON FACT ISSUES RAISED UNDER FELA.*

The principle forming the basis for the correct decision on the first point has been repeatedly spelled out and especially emphasized by this Honorable Court in numerous cases arising under FELA. This principle is simple and basic: workers seeking to have their rights under FELA judicially determined have the inviolate right to a trial by jury. The jury plays a "pre-eminent role" in FELA cases, *Ferguson v. Moore-McCormick Lines*, 352 U. S. 521, 523 (1957). The jury is "part and parcel" of the workers' remedy under FELA, *Bailey v. Central Vermont R. Co.*, 319 U. S. 350 (1943). The jury, not the court, is the fact-finding body, *Schulz v. Penna. R. Co.*, 350 U. S. 523 (1956). The Seventh Amendment to the Constitution provides that the right of trial by jury shall be preserved.

Petitioners' theory of their rights under FELA essentially is that Nichols was not really an independent contractor but instead was an agent or employee of Respondent, therefore Nichols' deceased employee, Baker, was an employee of the railroad within the meaning of Section 51 of FELA and came under the protection and within the benefits of FELA.

In the case at bar the trial court refused to submit to the jury the ultimate fact issues raised by the evidence

that determine Petitioners' rights and remedy under FELA. The jury was thereby prevented from passing on Petitioners' rights arising under FELA. The result is that Petitioners were effectively prevented from presenting their case under FELA to the jury.

The evidence was sufficient to require submission of Petitioners' case under FELA to the jury and it was error not to do so. *Shulz v. Penna. R. Co., supra.* This Honorable Court said in *Senko v. La Crosse Dredging Corp.*, 352 U. S. 370, 374 (1957) that it's prior holding in *South Chicago Co. v. Bassett*, 309 U. S. 251 (1940)

> "that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact."

Likewise, in the case at bar the determination of whether Nichols was an independent contractor or an employee of Respondent should have been left to the jury because the jury has the same discretion in finding this fact as they have in finding negligence or any other fact.

2. THE MORE IMPORTANT TESTS WERE: DID THE EVIDENCE RAISE THE FACT QUESTION THAT RESPONDENT HAD "CONTROL" OR "RIGHT TO CONTROL".

The legal problem of determining when a particular relationship is that of employer-independent contractor or of employer-employee (master-servant) is to be solved in each

case on its particular facts and ordinarily no one feature of the relationship is determinative, *Cimorelli v. New York Cent. R. Co.*, 148 F. 2d 575, 577 (C. A. 6, 1945). Like issues of negligence or causation, the solution to this fact question calls "for the exercise of common sense and sound judgment under the circumstances of particular cases" and the jury is the tribunal to decide such disputed question of fact. Cf. *Schulz v. Penna. R. Co.*, 350 U. S. 523 (1956).

However, the generally accepted tests are the control or the right of control over the details of the work reserved by the employer, *Singer Mfg. Co. v. Rahn*, 132 U. S. 518 (1889); *Chicago-Rock Island & Pacific Ry. Co. v. Bond*, 240 U. S. 449 (1916). These tests greatly aid in the fact determination as to what extent the person doing the work is in fact independent in its performance, *Cimorelli v. New York Cent. R. Co.*, 148 Fed. 2d 575 (C. A. 6, 1945).

The Restatement of the Law, Agency 2d (1958) Section 220 (1) defines a servant or employee as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." One who is an independent contractor instead of an employee or servant, is not subject to the employer's control or right to control the physical conduct in the performance of the service. *Chicago Rock Island & Pacific Ry. Co. v. Bond*, supra. Consequently, Petitioners' specially requested issues which the trial court refused to

submit to the jury, embodied the generally accepted test of "control or right to control" the details of the work being performed (R. 53, 54, 57). (Quoted p. 11 *supra.)*

In the analagous relationship problem created by the negligence of the "borrowed employee," this Honorable Court said, in *Standard Oil Co. v. Anderson*, 212 U. S. 215 (1909) at pages 221, 222:

> "To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, — a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of the work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation where the work furnished is part of a larger undertaking,"

and further, it was stated at page 225:

> "In many of the cases the power of substitution or discharge, the payment of wages, and other circumstances bearing upon the relation are dwelt upon. They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control."

The tests of "whose is the work" and "whose is the power of control" were approved in those cases arising under FELA to solve the relationship problem created by one railroad borrowing employees of another railroad. *Linstead v. Chesapeake and Ohio Ry. Co.*, 276 U. S. 28 (1928) and *Hull v. Philadelphia & Reading Ry. Co.*, 252 U. S. 475 (1920).

3. *THERE WAS SUBSTANTIAL EVIDENCE THAT RESPONDENT EXERCISED CONTROL AND HAD THE RIGHT TO CONTROL THE DETAILS OF THE WORK.*

In the light of the more important tests indicated above, the statement shows with crystal clarity that Petitioners have been deprived of their constitutional rights and their rights under FELA to a trial by jury. The statement summarizes the substantial evidence in the record that Respondent through its inspector, Slaton, had the right to and actually exercised the power of control over the details of work of Nichols' employees, including the deceased Baker. This evidence alone was substantial enough to at least raise a question for the jury to determine whether Nichols was an independent contractor.

It is difficult to contemplate evidence that would tend to show in Respondent any greater control or right to control the details of the work being done by Nichols' employees. The workers were instructed to obey Slaton and they did. (Right to control and control.) Only Slaton selected and marked off the places directing the pointmen where the points were to be driven into the roadbed. (Actual control.) Slaton saw to it that the workers, including the deceased Baker, had the proper amount of sand, cement, and water so that the grouting mixture was not too thick or too thin. (Actual control.) Slaton prevented the workers from pumping too little or too much grouting mixture into the roadbed and thereby prevented them from getting the tracks out of cross level.

(Control and right to control.) Slaton admonished their inattentiveness. (Control and right to control.) Slaton told the workers when and where to move to new locations and instructed them how far from the tracks the machines should be placed. (Control and right to control.) Slaton controlled the total of the grouting operation so that it did not interfere with the operation of the railroad's trains. (Control and right to control.)

The jury was entitled to find the foregoing as facts and to conclude that Respondent had control or a right of control over Nichols' employees as to the details of the work. Cf. *Bailey v. Central Vermont R. Co.*, 319 U. S. 350 (1943). The trial court and the Court of Civil Appeals should have looked at this evidence and the reasonable inferences therefrom to determine whether there was a fact issue to support Petitioners' theory that Nichols was not an independent contractor but was Respondent's agent or employee because Respondent controlled or had the right to control the details of the work. *Wilkerson v. McCarthy*, 336 U. S. 53 (1949). Beyond question the above evidence related and repeated by many witnesses raised the fact question at issue.

4. *THERE WAS SUBSTANTIAL EVIDENCE THAT RESPONDENT HAD THE "POWER TO CONTROL" THE WORK AND THAT THE WORK BEING PERFORMED WAS RESPONDENTS.*

Yet the above evidence was but a part of the evidence available for the jury's consideration had it been permitted

to pass on the ultimate issue of the relation between Nichols and Respondent. Using the tests approved by this Honorable Court of "power to control" and "whose is the work being performed" the jury should have been allowed to consider the nature of the work as a fact indicating that Nichols was not an independent contractor. Admittedly the work was a type of maintenance work which normally is a part of the regular business of Respondent. The work was performed by unskilled laborers using tools and machines in common use and readily available in the market. It was work Respondent could have done with its directly hired maintenance workers. The jury could have reasonably concluded that "whose is the work being performed?" was Respondent's.

The jury likewise could have considered that Respondent owned and of necessity had to control the place of the work, it being Respondent's double track main line interstate right of way. The jury could have considered that Respondent furnished the sand and cement used in the grouting mixture and assumed the obligation of transporting the crew and equipment by railway to and from the work site.

As other matters of fact the jury could have been allowed to consider, indicating that Nichols was not an independent contractor but was controlled by Respondent and doing Respondent's work, were the contract provisions directing Nichols to grout Respondent's roadbed only at specified places and to the satisfaction of Respondent's chief engineer or his agent; together with the evidence from Respondent's own witnesses that the area, pattern and number of feet to be grouted was up to the railroad. Also, from

Respondent's own witnesses came the admission that under the contract Respondent's roadmaster had the right to terminate the work and Respondent could cancel the contract at any time. And Nichols was paid on a unit or piece-work basis ($.10 per linear foot of roadbed grouted, plus $.30 per cubic foot of sand pumped over roadbed measured dry) rather than on the basis of one over-all contract price for the entire job as is usually done with independent contractors. This was evidence of an employer-employee relationship similar to that involving piece-work done by a servant for his master, especially when coupled with the rights of Respondent to determine the area and number of feet to be grouted and even to terminate the work and cancel the contract at any time.

Surely from this abundance of powerful proof, much of it uncontradicted, the jury (had the court allowed it to perform its function) could have reasonably concluded that Respondent had control or the right to control the details of the work being performed or that the work being performed was Respondent's work and therefore Nichols was not an independent contractor. Indeed, the evidence appears stronger than the evidence in cases where it has been held as a matter of law that the nominal employer of the injured worker was not an independent contractor. *Erie R. Co. v. Marque*, 23 F. 2d 664 (C. A. 6, 1928); *Cimorelli v. N. Y. Cent. R. Co.*, 148 F. 2d 575 (C. A. 1945); *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710 (C. A. 6, 1949); *Downs v. Baltimore & Ohio R. Co.*, 345 Ill. App. 118, 102 N. E. 2d 537, 30 ALR 2d 503 (1951).

However, the first and main point that Petitioners desire to present is that the issue before the trial court and Texas Court of Civil Appeals was whether there was any evidence and reasonable inferences in the record which the jury could find that Nichols was not an independent contractor; that despite all of the evidence introduced which would enable a jury to reasonably find that Nichols was not an independent contractor, the trial court refused to let the jury pass on such issue and the trial court's refusal has been affirmed. The result is that Petitioners were effectively prevented from presenting their case under FELA to the jury.

If this judgment is allowed to stand, Claude Baker and workers like Baker doing the railroad's work and exposed to the dangers of such work, are deprived of a jury trial to determine whether they come under the provisions of FELA. If allowed to stand this judgment is an invitation to railroads to relieve themselves of many of their obligations under FELA by doing their maintenance work through so-called independent contractors. The judgment allows form to triumph over substance. These results are not within the intent of Congress in enacting Sections 51 and 55 of FELA as amended, and this Court has not permitted such results to stand. *Sinkler v. Missouri Pacific R. Co.*, 356 U. S. 326 (1958). *Rogers v. Missouri P. R. Co.*, 352 U. S. 500 (1957).

5. *THE STATE COURT'S OPINION MISAPPLIED THE LAW.*

The refusal of the trial court to tender to the jury Petitioners' specially requested issues effectively deprived Peti-

tioners of a jury trial on their affirmative theories under FELA but the opinion of the Court of Civil Appeals neither clearly states nor properly analyzes this fundamental problem. No authority cited by it is on the point in question and no authority has been found that supports its judgment. Its opinion does not apply the established federal rule that in passing on whether there is sufficient evidence to submit the issue to the jury it should look only to the evidence and reasonable inferences which support Petitioners' case. *Wilkerson v. McCarthy*, 336 U. S. 53, 57 (1949). Its opinion does not recognize the duty of the court under FELA to see that Petitioners' asserted federal rights governed by federal law are fully protected as the Congress intended them to be. *Arnold v. Panhandle & Santa Fe Ry. Co.*, 353 U. S. 360 (1957). Instead the opinion clutches at straws to reach the erroneous conclusion that the trial court was correct in its denial to Petitioners of a jury trial on FELA issues.

Looking to that part of the opinion dealing with the issue in question,[1] it is seen that it depends principally

[1]This brief would be unduly lengthened by a minute detailed analysis of the opinion to reveal the numerous unwarranted conclusions and erroneous statements of law therein. Illustrative of some of the more glaring examples are:

Placing the burden on Petitioners to request an issue on the

> "* * * fact question * * * of whether the work of grouting was extraordinary maintenance, as testified by Engineer Savage, rather than ordinary; and again Appellant [Petitioners] cannot be heard to complain, no request having been made for submission of such an issue" (R. 215).

This was not an ultimate issue. But if it was, surely it was Respondent's burden.

The opinion (R. 216) says that the contract between Respondent and Nichols was not terminable at the will of Respondent, giving as a reason

(Footnote 1 continued on p. 27.)

on evidence deemed favorable to Respondent and draws only inferences favorable to Respondent. (R. 215-218.) Aided by such incorrect means it reaches the untenable conclusion that there was no evidence for the jury to pass on.

A. The Opinion Admits Respondent Exercised Actual Control of the Details of the Work; But, Misstating the Law, Held Such Exercise of Actual Control "Not Material."

The opinion states:

> "The instructions given by Inspector Slaton concerning details of the work, here emphasized by appellant, are simply referrable to the contract in question and his duty to require its satisfactory performance." (R. 217.)

This admits that Respondent's Inspector Slaton did give instructions to Nichols' employees concerning details of their work. It even asserts that the authority for such instructions lies in the contract itself, being "simply referrable to the contract in question and his duty to require its

(Footnote 1 continued from p. 26.)
for such conclusion: "Where a writing does fix a definite time for performance the law imputes a reasonable time." The reason given deals with the time for the performance of a contract rather than the point really at issue, namely whether the contract was terminable at will. The court's conclusion is equivalent to saying that there can be no written agreement terminable at will of one of the parties where there is no definite time for performance stated in the agreement. Such a proposition is of course incorrect on its face. Here again the court was looking only to inferences and rules favorable to Respondent rather than looking to the evidence and inferences arising therefrom favorable to Petitioners, as was its duty under the law. The opinion overlooks the testimony of Respondent's own witnesses that under the contract the area to be grouted was purely up to the railroad and that the contract could be cancelled at any time.

The opinion states (R. 217) "This contractor was in the specialized business of grouting." This statement is an unwarranted conclusion, since there was evidence in the record that grouting was merely a type of maintenance work done by ordinary machines readily available in the market and operated by common laborers.

satisfactory performance." The opinion then makes this startling conclusion:

> "The *fact* of actual interference or exercise of control by the employer is not material, absent the *right* or authority to interfere or control; Cimorelli v. New York Cent. R. Co., supra." (R. 217.) (Emphasis by the Court.)

This language misstates and misapplies the applicable rules of law. It is simple hornbook law that exercise by the employer of actual control of the details of the work of the employees of a nominal independent contractor is evidence that the contractor is not in fact independent.[2] Yet the

[2]For example: 56 C. J. S. Master and Servant, Sec. 3 (3), pages 53-55 states:

> "It has been variously held that control as to the manner, mode, and detail of the performance of the work is the main, essential, and decisive question; the chief and distinguishing criterion; the prime, decisive, determining and most important factor; the chief and controlling consideration; the most important element; the real test, and, likewise, such control has been held to be the essential, important, principal, primary, ultimate, basic, vital, supreme, decisive, and controlling test.
>
> "*Control*" *means* the right to control rather than its actual exercise; it is not the fact of actual interference with the control but the right to interfere that makes the difference between an independent contractor and a servant; if the employer has the right of control, it is immaterial whether he actually exercises it, although the extent of control actually exercised may be considered in determining the right of control. Where a master-servant relationship is created, the master's failure to assert or exercise his right of control does not change the relationship. On the other hand, although a contract creates a contractee-independent contractor relationship, it may be transformed into a master-servant relationship by the employer's assumption of control over the details of the work, and it has been held that the relationship of master and servant exists where the employer actually exercises control. The employer must have control over the physical conduct of the employee in the performance of the work, and in applying the test for purposes of tort liability, it should be directed to the particular factor or matter on which liability is sought to be established."

The law in Texas is really no different than elsewhere, for the Supreme Court of Texas recently said, in *Great Western Drilling Co. v. Simmons*, Tex. , 302 S. W. 2d 400, 403 (1957): "* * * the right of control in the alleged master over the detailed means whereby the alleged servant is to accomplish an ultimate result, may be as important as the actual exercise of that right, * * *."

opinion says it is "not material." Misstating the law, the opinion dismisses all of the evidence bearing on Slaton's exercise of actual control of the details of the work. But the question before the Court was whether there was a fact issue for the jury and in passing on this question the Court had the duty and obligation to look only to evidence and reasonable inferences which support Plaintiffs' claim. And the more important tests to be applied were whether there was evidence that Respondent had (1) control, or (2) right to control the details of the work. Misstating the law, the Court dismisses (1) "control" as "not material." Ignoring the evidence, the Court then decides as a matter of law, wrongfully, that there was no "right to control." No explanation is suggested as to how it is legally or logically possible for Respondent to have actual control of the details of the work of Nichols' employees and yet not have the right to such control.

Cimorelli v. New York Cent. R. Co., 148 F. 2d 575 (C. A. 6, 1945) is cited as authority for the above proposition. But *Cimorelli* is misinterpreted and its words distorted. *Cimorelli* stands for the converse of the proposition advanced by the Texas Court. In *Cimorelli* at p. 528 appears the following statement:

> "The fact of actual interference or exercise of control by the employer is not material. If the existence of the right or authority to interfere or control appears the contractor cannot be independent."

Thus *Cimorelli* actually held that even though the employer does not exercise actual control, the existence of "right of control" by the employer is sufficient. There-

fore, the lack of evidence of the employer's exercise of actual control is not material. In *Cimorelli* there was a lack of evidence showing the exercise of actual control by the employer (the railroad) of the details of the work of Duffy's (independent contractor) employees. But the Court found that the whole project involved so many interdependent details that the control of any one of them could not be surrendered by the railroad without disorganization of the whole and that from the very nature of the work its performance could not be committed exclusively to the discretion of the contractor. Therefore the Court concluded as a matter of law that the railroad had the right to control even though it did not exercise actual control of the details. The facts in the instant case support this reasoning. The facts are even stronger in the case at bar because there was admittedly an abundance of evidence of the employer's (Respondent's) exercise of actual control.

The facts in *Cimorelli* are strongly analgous to the facts in the case at bar. But the decision in *Cimorelli* is flatly contra. There the trial court held as a matter of law that the Duffy Construction Co. was an independent contractor. The Sixth Circuit Court of Appeals reversed this holding and held as a matter of law Duffy was not an independent contractor. In instant case, the trial court has held as a matter of law that Nichols was an independent contractor and the Texas Court has affirmed that decision.

Analysis of the cases of *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710 (C. A. 6, 1949) and *Pennsylvania R. Co. v. Roth*, 163 F. 2d 161 (C. A. 6, 1947), cert. den., 332 U. S.

830 (1947) brings out the errors of law made in the case at bar even more clearly.

In *Barlion* the railroad contracted with an "independent contractor" Art Schreck, Inc., to unload railroad cars, to stencil, mark, and store inbound shipments, and to remark and reload outbound shipments. Barlion, an employee of Schreck, Inc., was injured while working for Schreck, Inc., in the railroad yards, and sued the railroad under FELA. The trial court held as a matter of law Barlion was an employee of the railroad. The Court of Appeals' opinion was that its decision was controlled by the holding in *Pennsylvania R. Co. v. Roth, supra.* The facts in the *Roth* case were similar to those in the *Barlion* case. However, in *Roth* there was evidence of exercise of actual control of the details of the work of the employees of the "independent contractor" whereas in Barlion the Court emphasized at page 711:

> "But no one from the railroad company supervised him (Plaintiff Barlion) and none of the railroad employees had ever told him what to do or what not to do."

On that basis the railroad company tried to distinguish *Barlion* from *Roth* but the Court said at page 712:

> "The railroad had this right of control in the instant case to the same extent as it had in the *Roth* case, and it is the right of control, rather than its exercise, that determines whether or not a contractor is an independent contractor. The *Roth* case, therefore, cannot be distinguished on the ground that the control of the railroad company was there exercised whereas it was not exercised in the present case."

The Court of Appeals then held as a matter of law that Schreck, Inc., was not an independent contractor and that

Barlion was subject to FELA as an employee of the railroad.

So in *Roth*, as in the case at bar, the railroad exercised actual control of the details of the work of the contractor. Roth held, as a matter of law, that the contractor was not independent. But in the case at bar the court, admitting the railroad exercised actual control of the details of the work of the contractor, said that was "not material;" held there was no jury issue raised, and held as a matter of law, the contractor was independent.

It is submitted that the more reasonable conclusion in instant case and one that a jury might well make if it had an opportunity is that actual control of the details of the work of Nichols' employees by Respondent indicate that Respondent had the right and authority to exercise such control. "Fairminded men might reach different conclusions—" *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 353 (1943). Certainly the Court of Civil Appeals' conclusion cannot be valid under the rules of this Honorable Court, because the duty and obligation of the trial court and of the Court of Civil Appeals was to consider the evidence and all reasonable implications arising therefrom, even though they may be conflicting, to determine if the fact issue was raised for the jury's decision as to whether Nichols was or was not an independent contractor. *Schulz v. Pennsylvania R. Co.*, 350 U. S. 523 (1956).

The admitted fact that Respondent did exercise control and give directions to Nichols' employees concerning the

details of their work was substantial evidence in itself that Respondent had the right and authority, as well as the power, to exercise such control and give such directions. A jury could find from this admitted fact alone that Nichols was really an agent of Respondent and was not an independent contractor. Also, whether Respondent had the "right to control" Nichols, was a question of fact for the jury to consider. It was one of the very elements included in the definition of independent contractor which Petitioners requested the trial court to present to the jury but which request was refused. (Page 11, *supra.)* The Court of Civil Appeals was clearly wrong in treating this as a question of law for it to decide.

B. The Opinion Is So Inconsistent That It Refutes Itself

The opinion denied Petitioners a jury trial by holding there was no evidence by which the jury could answer Petitioners' specially requested issue that Nichols was not an independent contractor. Yet it also holds that the evidence did not establish that Baker was covered by FELA as a matter of law on the basis that there was sufficient evidence favorable to Respondent to raise fact issues which should have gone to the jury on (1) the intent and purpose of Respondent and Nichols in making the contract, and (2) whether the maintenance work of grouting was "regular" maintenance work. It then held that Petitioners waived their right to have these two issues presented to the jury because Petitioners did not request them.

There can be little, if any, doubt that these two issues are mere evidentiary issues to be considered in deciding the

ultimate issue as to whether Nichols was an independent contractor. See quotation *Standard Oil Co. v. Anderson*, 212 U. S. 215, 225 on page 20 *supra*. Also see *Atlantic Coast Line R. Co. v. Treadway*, 120 Va. 735, 93 S. E. 560 (1917), cert. den., 245 U. S. 670 (1918). The jury could have, in determining whether Nichols was an independent contractor, given consideration to the evidence of the intent and purpose of the contract between Respondent and Nichols such as the reason why Nichols assumed such extensive liability under the indemnity clauses or why Respondent could cancel the contract at will. Likewise the jury could have, in determining whether Nichols was an independent contractor, considered evidence of the nature of the maintenance work done by Nichols. If they found that the maintenance work was an essential part of Respondent's operational duties imposed by law they could have concluded that Nichols necessarily could not be an independent contractor. If they considered it some extraordinary type of maintenance work that might possibly be delegated to an independent contractor then it would be some evidence that Nichols was in fact an independent contractor.

If the Court of Civil Appeals' opinion is correct in holding that there was evidence to raise these two evidentiary issues it is necessarily incorrect in holding that there was no evidence to raise the ultimate issue of Nichols' status as a contractor. Its denial of a jury trial to Petitioners was clearly incorrect. This case is an excellent example of the

lower court failing to respect the jury function in passing on disputed facts and in drawing inferences from proven facts. *Wilkerson v. McCarthy*, 336 U. S. 70, 71 (1949).

The opinion (R. 217) concludes that the issue is controlled by *Chicago Rock Island & Pacific Ry. v. Bond*, 240 U. S. 449 (1916) where William L. Turner was held an independent contrator under a contract with the railroad to make provision for a daily supply of coal for the operation of the railroad. But the issue in the *Bond* case was not the denial of a jury trial as is the issue here. In *Bond* a jury trial was had on the question of whether Turner was an independent contractor and the issue before this Honorable Court was whether there was any evidence that the Railroad had the "right to control" Turner. This Honorable Court holding that there was no such evidence said at page 455:

> "We are unable to concur with the learned court in its conclusion. There was, it is true, and necessarily, a certain direction to be given by the company, or rather, we should say, information given to Turner. But the manner of the work was under his control, to be done by him and those employed by him. He was responsible for its faithful performance and incurred the penalty of the instant termination of the contract for nonperformance. This was only a prudent precaution, indeed, necessary in view of the purpose of his contract, which was to make provision for a daily supply of coal for the operation of the railroad. The power given was one of control in a sense, but it was not a detailed control of the actions of Turner or those of his employees. It was a judgment only over results and a necessary sanction of the obligations which he

had incurred. It was not tantamount to the control of an employee and a remedy against his incompetency or neglect."

6. *THE BRIEF FOR RESPONDENT IN OPPOSITION*

A. Petitioners Desire to Clarify Any Incorrect Impression of the Record That Might Be Construed from Brief for Respondent in Opposition.

Respondent does not undertake to deny or answer Petitioners' argument that they were deprived of their right to a jury trial on the issues raised under FELA. Instead Respondent undertakes to avoid the consequences of such denial of a jury trial by laying undue emphasis on the state workmen's compensation aspect of the case. This aspect of the case is irrelevant to the FELA issues involved except possibly as part of the facts that would have been considered by the jury if it had been permitted to pass on the question of whether Nichols was or was not an independent contractor. And it is completely irrelevant to the ultimate question of Respondent's liability to Petitioners for negligently causing Baker's death.

But although actually irrelevant to any issue or questions now before this Court, that fact that Petitioners received a compensation award has been injected by Respondent in such a manner that Petitioners are compelled to point out its proper setting in the record. One could get the impression from Respondent's brief that Petitioners seek double compensation. Or that Petitioners receiving a compensation award for Baker's death before learning of the relationship between Nichols and Respond-

ent, is doing something improper in seeking to hold Respondent liable for negligently causing Baker's death.

In the "Statement" of Respondent's brief, page 4, it is stated "Petitioners have never acknowledged that they improperly claimed benefits under the Workmen's Compensation Laws of the State of Texas, * * *." There is no fact in the record to support the statement that Petitioners "improperly" claimed such benefits. The phrasing of this statement is akin to the old familiar loaded question "Have you stopped beating your wife?"

Respondent continues with the statement on page 5:

> "Petitioners do not even acknowledge that the workmen's compensation carrier, Employers Liability Mutual Insurance Company of Wisconsin, will be entitled to recoup its payment in the event Petitioners should be successful in this effort to recover from Respondent. (S. F. 207.)"

and then with the statement on page 11:

> "Petitioners' counsel does not even concede that the compensation carrier is entitled to recoup its compensation payment (S. F. 207) in spite of the right of subrogation afforded compensation carriers against negligent third parties by the workmen's compensation laws of the State of Texas."

These statements do not accurately reflect the record. Without cluttering this brief with details, it is necessary only to point out that:

(1) Petitioners state in their pleading that if Baker was not within the provisions of FELA, that Nichols' compensation carrier, Employers Mutual Liability Insurance Co. of Wisconsin (hereinafter called "Insurance Co.") is subrogated to the rights of Petitioners out of any amount

recovered by Petitioners from Texas and Pacific Railway Co. (R. 10, 11.).

(2) During the trial on October 3, 1956 it was stipulated by counsel for both parties that if the Insurance Co. has the right of subrogation against Respondent, T & P Ry. Co., the amount to which it was entitled is seven thousand nine hundred and nineteen dollars and ninety-four cents.

(3) At the same time counsel for both parties agreed that they did not stipulate that said Insurance Co. is entitled to subrogation in the event it be found that Baker was covered by the provisions of FELA (R. 161.).

(4) On October 4, 1956, Insurance Co. filed a plea in intervention claiming a right of subrogation to the rights of Petitioners to the extent of payment made to Petitioners under the Workmen's Compensation Act and entitled to have judgment out of any recovery from T & P Ry. Co. Insurance Co. plead in the alternative that if Baker is found to be an employee of T & P Ry. Co. that the compensation award to Petitioners was made by mutual mistake and that it was entitled to recover the award out of any recovery by Petitioners from T & P Ry. Co. (R. 24-26).

(5) And on the same day, the Respondent, T & P Ry. Co., amended its answer to state that if it should be determined that Baker was an employee of Respondent then the Insurance Co. is not entitled to be subrogated by reason of payment of Workmen's Compensation to Petitioners because by making such payment it was a pure volunteer (R. 19).

No denial or answer to Insurance Co.'s plea of intervention was ever made by Petitioners.

B. The Compensation Award to Petitioners Was a Fact for the Jury to Consider had It Been Permitted to Pass on Whether Nichols Was or Was Not an Independent Contractor.

It is arguable that the fact that Nichols carried Workmen's Compensation insurance and other insurance, to meet the indemnity obligations imposed upon him by the contract with Respondent, is a fact indicating that Nichols was really an independent contractor. But the more plausible argument is that it is a fact from which the jury could have found he was not. This latter argument is supported by direct authority.

In *Erie R. R. Co. v. Marque*, 23 F. 2d 664 (C. A. 6th 1928), the so-called independent contractor was also required by the contract with the railroad to comply with the Workmen's Compensation Laws of the state. The court said at p. 665 that it had no trouble in believing the intent of this provision was to evade the force and effect of FELA for the purpose of substituting the state Workmen's Compensation Act for FELA because the smaller compensation given under the state act would make it more economical from the employer's stand point to operate. It then held as a matter of law that the contractor was not independent.

Cimorelli v. New York Cent. Ry. Co., 148 F. 2d 575 (C. A. 6th 1945), relied upon by Respondents on page 8 of their brief, is discussed extensively, pages 29, 30 *supra*. In *Cimorelli*, the contractor, Duffy, was required to carry

full insurance coverage including Workmen's Compensation. And like the case at bar, there was a special provision in the contract that Duffy was to perform the work as an independent contractor with exclusive supervision of the work. But again the Court held as a matter of law that the contractor was not independent.

Even where the railroad itself is a subscriber to a state workmen's compensation insurance for its employees engaged in intrastate commerce, most of the cases have held or recognized that the payment and acceptance of compensation under the state workmen's compensation act did not preclude the maintenance of an action under FELA by one engaged in interstate commerce within the meaning of that act. The basis of these cases is that award, settlement or acceptance of benefits under workmen's compensation cannot be treated as res judicata of the issue of the employee's engaging intrastate or interstate commerce. *Hoffman v. New York, N. H. & H. R. Co.*, 74 F. 2d 227 (C. A. 2d 1934), cert. den. 294 U. S. 715 (1935); *Pritt v. West Va. Northern R. Co.*, 51 S. E. 2d 105 (S. C. W. Va. 1948), cert. den. 336 U. S. 961 (1949). And see annotation at 6 ALR 2d 581 (1948) which is directly in point.

There is no basis in the record to argue that the compensation award to Petitioners was res judicata of the issue of whether Nichols was or was not an independent contractor. Nor any basis that it created any election, waiver or estoppel with regard to such issue. At the most, it was merely a fact for the jury's consideration—it is had been permitted to pass on said issue.

POINT TWO: Nichols was not an independent contractor because the contract provided for Nichols to perform Respondents non-delegable duties and its effect is to permit Respondent to exempt itself from its liabilities under FELA in violation of Sec. 55 of FELA.

The Federal and Texas statutes impose upon Respondent the non-delegable duty to maintain its railroad facilities including of course its tracks and roadbed, Section 1(3), (4) and (21) of the Interstate Commerce Act, 49 U.S.C. Section 1(3), (4) and (21); Article 6506 and 6507, *Vernon's Texas Statutes* (1948), Appendix "A" *Infra*, pp. 45-52; *Erie Railroad Co. v. Marque*, 23 Fed. 2d 664 (C. A. 6, 1928); *Atlantic Coast Line Ry. Co. v. Treadway*, 120 Va. 735, 93 So. E. 560 (1917), cert. den., 245 U. S. 670 (1918). Section 51 of FELA imposes such a duty, *Pederson v. Delaware, L & W Ry. Co.*, 229 U. S. 146, 151 (1913). But Respondent has attempted to exempt itself from any liabilities by having a certain type of its non-delegable maintenance work done by Nichols under a contract labeling Nichols an independent contractor and providing that Nichols shall fully indemnify Respondent for any liability arising from the performance of the work. Therefore the contract is void under Section 55 of FELA.

The opinion attempts to avoid the effect of the non-delegable nature of the maintenance work done by indicating that "extraordinary" or "special" maintenance work is delegable even though "regular" maintenance work is not delegable under *Erie Railroad Co. v. Marque*, *supra* (R. 215). No authority is cited for such a proposition ex-

cept *Norman v. Spokane-Portland & Seattle Ry. Co.*, 101 F. Supp. 350 (1950) aff'd., 192 F. 2d 1020, cert. den., 342 U. S. 945. But in *Norman* the parties *stipulated* that

> "Gilpin was in fact a truly independent contractor acting under a bona fide contract with the railroad, which was not designed or intended as a scheme or artifice to evade the provisions of [FELA]."

But use of the adjectives "special" or "extraordinary" can not change the fact that the work was one method selected by Respondent to maintain its tracks in a condition required of it by law. The record does not reflect what other methods could have been used. Regardless of the adjectives applied, it was maintenance work essential to the proper and safe function of the railroad and bore a direct relationship to the operation of the Respondent's main lines in interstate commerce.

The opinion also attempts to avoid the "intent or purpose" of the contract by relying on the opinion of Respondent's assistant chief engineer that the contracts was not a scheme or device to get around FELA. Instead it should have applied the rule long ago laid down by this Court in *Philadelphia, Baltimore & Washington R. R. Co. v. Schubert*, 224 U. S. 603, 613 (1912) that the words "purpose or interest" do not refer simply to an actual intent to circumvent the statute. Regardless of the intention of the parties, if the necessary operation and practical effect of the contract is to exempt the carrier from any liability imposed by FELA, the contract is void.

Petitioners urge this Honorable Court to consider the possible effect the Texas court's opinion will have upon the

future operation of FELA, at least in Texas. Under such opinion it is possible for a carrier to contract for "independent contractors" to do all of its required work except the actual operation of trains. It should be reversed "to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Rogers v. Missouri P. R. Co.*, 352 U. S. 500, 507 (1957).

POINT THREE: Claude Baker was doing maintenance work as part of Respondent's unitary enterprise and exposed to all of its inherent dangers, therefore he and workers in his position should be classified employees of carriers within the meaning of FELA.

Baker was, and many workers like him, are doing the carrier's work such as this maintenance work. Their duties are in the furtherance of interstate commerce or their duties directly or closely and substantially affect such commerce. Though by legal form they technically are employees of an "independent contractor" the actual, practical fact is that they are railroad workers giving their labor to the furtherance of the carrier's enterprise and daily exposed to the risks inherent in railroad work. They should be classified as employees of the carrier within the meaning of FELA because they fit the definition of such employees and all the reasons exist for including them under the broad purpose of FELA.

Sinkler v. Missouri P. R. Co., 356 U. S. 326 (1958) dealt with the scope of the meaning of the word "agent" in FELA. Here we are concerned with the scope of the meaning of the word "employee". Petitioners urge that all the

reasons expressed in the *Sinkler* case are also present for giving an accommodating scope to the word "employees" to give vitality to the standard governing the liability of carriers to workers injured while doing the carrier's work. Sinkler held the railroad liable for the negligence of an independent contractor, who is engaged in a "common endeavor" with the railroad. Nichols and its employees were likewise engaged in a "common endeavor" with Respondent, and Respondent itself has been found guilty of negligence causing Baker's death on Respondent's property. The negligence occurred during the passing of Respondent's trains on its interstate lines on which Nichols was performing maintenance work. And Respondent has retained control and the right to control every aspect of Nichols operation wherein in *Sinkler* no such control was retained. The movement of the trains was railroad business. The maintenance work by means of grouting was certainly railroad business especially since it was the kind of work Respondent admittedly could have done for itself.

But Respondent, rather than doing the necessary maintenance work itself, arranged with Nichols to supply the crew and equipment to perform this work on its behalf. Clearly, as in *Sinkler*, this work was done to further the task of Respondent's enterprise; and for purposes of FELA, Baker and the other crew members were as much a part of Respondent's total enterprise as was Respondent's inspector Slaton or its other regular maintenance employees. The principal is laid down in *Sinkler*, p. 330 that:

> "it was the conception of this legislation that the railroad was a unitary enterprise, its economic resources,

> obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged is a common endeavor."

It is submitted that principle applies with equal force here. Even if Nichols was an independent contractor and was really free of detailed supervision of its operations by Respondent, this would be irrelevant, because at the time Baker was killed Nichols' crew members were engaged as part of that "unitary enterprise" in furthering the operational activities of Respondent.

That same basic principle has been applied to determine that workers were "employees" and not independent contractors under the Fair Labor Standard Act, *Rutherford Ford Corporation v. McComb*, 331 U. S. 722 (1947). In admiralty it has been applied to determine that a worker employed by an independent stevedoring company is nevertheless a "seaman" when doing a seaman's work and incurring a seaman's hazards. *Seas Shipping Co. v. Sieracki*, 326 U. S. 85 (1946).

This Honorable Court is urged to consider the combination of factors present in the case at bar leading to the reasonable conclusion that Baker was as a matter of law, an employee of Respondent within the meaning of FELA. Baker was doing Respondent's work and exposed to the inherent risks. He was a part of its unitary enterprise in carrying out its franchise obligations. These obligations are statutory and non-delegable. The necessary operation and effect of the contract was to exempt Respondent of some of its statutory obligations. It was therefore void and

illegal. Admittedly the details of the work were controlled by Respondent. Of necessity Respondent had the right to control, as well as the power to control, the details of the work.

Conclusion

The judgment and opinion of the Court of Civil Appeals deprive Petitioners, and those similarly situated, of the right to trial by jury; deprive them of the protection of FELA and allow Respondent to avoid its liabilities under FELA. The opinion is in the teeth of Section 55. For all of the reasons herein given the judgments of the Court of Civil Appeals and the trial court should be reversed and remanded, with directions that W. H. Nichols is not an independent contractor or Claude Baker was an employee of Respondent within the meaning of FELA; or in the alternative, that a jury trial be had on these issues.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISION AND STATUTES

THE 7TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

In suits at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

FEDERAL EMPLOYERS LIABILITY ACT, 35 Stat. 65, 66, 53 Stat. 1404, 45 U.S.C., Sec. 51, 53 and 55

Section 51. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency,

due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Section 53. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Section 55. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such

common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

INTERSTATE COMMERCE ACT, 41 Stat. 474, 49 U.S.C., Sec. 1 (3), (4) and (21)

Section 1.

(3) *Definitions.* The term "common carrier" as used in this chapter shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including

all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "transmission" as used in this chapter shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

(4) *Duty to furnish transportation and establish through routes; division of joint rates.* It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reason-

able, and equitable division thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(21) *Power of Commission to require adequate facilities or extension of line—Penalty.* The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part [§ 1-5, 5b-15a, 16, 17-23, 26, 27 of this title] party to such proceeding to provide itself with safe and adequate facilities for performing as a common carrier its car service, as that term is used in this part [§ 1-5, 5b-15a, 16, 17-23, 26, 27 of this title], and to extend its line or lines: Provided, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any public carrier subject to this part [§ 1-5, 5b-15a, 16, 17-23, 26, 27 of this title] which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue in the United States and may be recovered in a civil action brought by the United States.

Art. 6506. Vernon's Texas Statutes (1948), Maintenance; powers of Commission

The Commission shall see that each railroad corporation owning or operating a line of railroad in this State shall maintain its roadbed and track in such condition as to enable it to perform all of its duties as a common carrier with reasonable safety to persons and property carried by it and its employes and with reasonable dispatch. The Commission is vested with full power to require any railroad company to purchase or secure for installation in its roadbed or track all ties, rails, ballast and other material and equipment as may, in the judgment of the Commission, be necessary for the proper maintenance of the whole or any designated portion of such track and roadbed so as to put the same in safe condition and enable such railroad to adequately perform its duties to the public and to transport freight and passengers with safety and dispatch.

Art. 6507. Vernon's Texas Statutes (1948), Penalty for failure to comply.

When the Commission has made such order as authorized by the preceding article, each railroad company subject thereto shall promptly comply with the terms thereof, and for failure or refusal to do so, such company or its receiver shall become liable to the State of Texas, for a penalty of not less than five hundred nor more than five thousand dollars for each offense. In addition to such penalties, any court of competent jurisdiction upon application of the Attorney General shall issue writs of mandamus and mandatory injunctions and other proper writs to compel the compliance with such orders.